MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-807

CYLINDER GAS, CHEMICAL, PETROLEUM, AUTO-SERVICE AND ACCESSORY DRIVERS, MAINTENANCE, MECHANICS, HELPERS AND INSIDE EMPLOYEES LOCAL NO. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

OTTAWA SILICA COMPANY,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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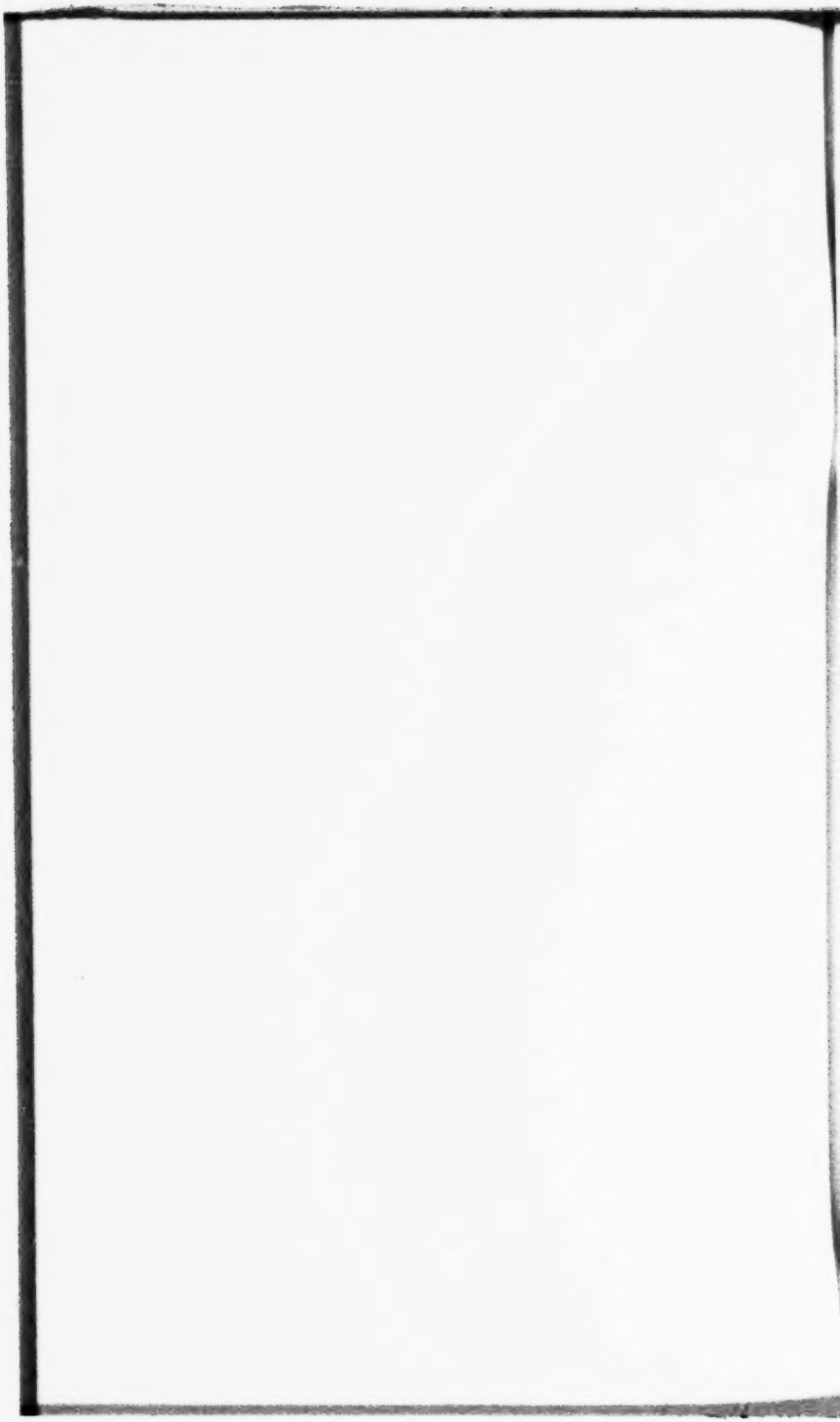

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on August 23, 1973.

CITATIONS TO OPINIONS BELOW

The Decision and Order of the National Labor Relations Board were reported at 197 NLRB No. 53, which have not yet been published in bound form; they are printed in Ap-

pendix B, *infra*, A-3-34, of this Petition. The Order of the Court below has not been published, but is printed in Appendix A, *infra*, pp. A-1-2, of this Petition.

JURISDICTION

The order of the Court below was entered on August 23, 1973. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTION INVOLVED

Whether an employer violates Section 8 (a)(1) or (3) of the National Labor Relations Act by locking out its employees and by then continuing the production operations, which those locked out employees normally performed, by using worker replacements from other labor sources?

STATUTES INVOLVED

The statutory provisions involved are Sections 7, 8 (a)(1), 8 (a)(3), and 13 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151, et seq., referred to as the "Act"). They are printed in Appendix C, *infra*, p. A-35.

STATEMENT OF THE CASE

The basic question in this case is whether the Employer's utilization of replacement workers from outside the bargaining unit during a lockout so decimates the collective bargaining rights of the regular unit employees as to violate their statutory right to union representation. As the Court of Appeals for the Seventh Circuit clearly held, such employer conduct is inherently destructive of employee rights—"*per se*, an unfair labor practice." **Inland Trucking Co. v. NLRB** (7th Cir. 1971), 440 F. 2d 562, 565.

As is normal in labor negotiations, the Employer and the Union had reached a point of hard bargaining; the contract was about to expire and the Union, anxious to apply some pressure, refused to pledge that it would not strike (A. 23-24). The Employer, out of self-proclaimed concern for its customers and the desire to avoid losing accounts (which would appear secure, having been held for almost a generation),[1] determined to lock out its bargaining unit employees, replace them with outsiders, and continue operations (A. 24-25, 26-27).

The facts are not disputed: rather than continue operations without a new contract and thus risk a possible strike—which, curiously, it was sure would **not** prevent service to its regular customers (A. 14)—Respondent locked out its employees and then proceeded to operate without them, maintaining shipments to glass manufacturing customers at 95% of their normal volume (A. 27, n. 7), at a time when unit employees had been cut off from their normal opportunities to work. In the end, the Employer failed to show that it "would have been in any substantial sense more economically or business-wise inconvenienced by a strike . . . than it was when it voluntarily triggered a work stoppage of its regular employees by locking them out . . ." (A. 27). Thus, the Employer's actions simply added the pressure of continued operations, and the consequent insulation of the employer from economic inconvenience or disadvantage, to the burden of the bargaining lockout already imposed upon the employees; no other economic explanation is suggested or demonstrated by the record (A. 27-28).

The issue comes down to whether or not the Employer may impose a lockout for bargaining purposes and then replace the locked out employees so that their only choice is capitulation or indefinite unemployment. The record will not sustain any other economic analysis.

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[1] Federal Glass Company, for example, made the Employer its exclusive source of supply for over twenty years (A. 26).

REASONS FOR GRANTING THE WRIT

I. By Creating an Irreconcilable Division Among the Courts of Appeals, the Decision Below Has Caused Serious Uncertainty About the Rights of Employees Who Have Been Locked Out and Then Replaced.

Both the National Labor Relations Board and the United States Court of Appeals for the Seventh Circuit have held that an employer's use of replacements to continue operations during a lockout is so devastating as to be inherently destructive of employee rights. Relying upon the Board's decisions in **Inland Trucking Co.,** 179 NLRB No. 350, and **The Ruberoid Company,** 167 NLRB 987, the Seventh Circuit held that a single employer lockout supported by the use of work replacements "forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer." **Inland Trucking Co. v. NLRB** (7th Cir. 1971), 440 F. 2d 562, 564, cert. denied, 404 US 858. This enormous disparity of economic positions so deprives employees of effective collective bargaining rights as to be a *per se* violation of the Act.

Departing from this clear precedent, the Board has now fallen into three groups, forming a 2-1-2 division which has consistently abandoned the prior rule and invoked "flimsy" evidence to warrant acceptance of this hitherto unlawful tactic, **Inter Collegiate Press,** 199 NLRB No. 35, slip. opinion, p. 11. Rather than correct this error, the Court below enforced the Board's new, loosely amalgamated theory with a one sentence explanation that the "whole record" and "unique circumstances" of this case constituted substantial evidence sufficient to support the order (A. 1-2).

If the reference to "unique circumstances" means the factual situation here at bar, more recent decisions suggest both a

growing use of this tactic and a readiness to treat virtually any claim of economic advantage as a valid exception to the **Inland Trucking** rule. Indeed, every decision on this point since the one at bar has allowed the very conduct which the Seventh Circuit held to be "*per se*, an unfair labor practice". **Inland Trucking Co.,** *supra*, at 565; In **Inter Collegiate Press,** *supra*; **Ralston Purina Co.,** 204 NLRB No. 43; **Hess Oil Virgin Islands Corp.,** 205 NLRB No. 3; **Ozark Steel Fabricators,** 199 NLRB No. 136; **WGN of Colorado, Inc.,** 199 NLRB No. 169.

And if the reference to "unique circumstances" is a limited acceptance of a new rationale, the result is neither singular nor appropriate. The United States Court of Appeals for the Eighth Circuit has now adopted Chairman Miller's "balancing" theory, which would permit the *per se* violation whenever the Employer offered some economic rationale for its use, squarely rejecting the **Inland Trucking** rule in the process. **Inter Collegiate Press v. NLRB** (8th Cir. 1973), Docket No. 72-1749.[2]

Whether characterized as unique facts or special rules, there is no way to reconcile the adoption of a balancing test which rests on economic analyses and subjective motivation with a *per se* rule which treats any use of work replacements during a single employer lockout as inherently destructive of employee rights. Thus, the decision below has divided the Circuits, denied important employee rights, overruled established precedent *sub silentio*, and gravely confused the limits of permissible conduct in labor relations. Without a definitive resolution of these totally contradictory rulings, neither the employer, the employee, nor the union can reasonably anticipate whether an employer may continue operations during a lockout.

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[2] This decision, issued October 25, 1973, has not yet been published in the official reports. It is printed in the unofficial Commerce Clearing House, Inc. loose-leaf service at 72 CCH LC ¶ 14,018.

II. Because the Employer's Use of Replacements During a Lockout Gives Its Employees No Choice But Abandonment of Further Collective Bargaining, This Tactic Denies These Employees Their Section 7 Rights.

The inevitable result of the tactic here in question is:

> "Employees . . . forced, at the initiation of the Employer, not only to forego job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked-out employees were endeavoring to bargain. Permitting the Employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and content of that right, as protected in 29 USC § 157." **Inland Trucking,** *supra*, at 564.

For this reason, the Court of Appeals for the Seventh Circuit enforced the Board's order in **Inland Trucking** and held that a single employer "lock out [during which] . . . a company . . . continued operations with replacement labor, is *per se* an interference of protected employee rights, and, accordingly, *per se* an unfair labor practice under § 158(a)(1)." *Id.*, at 565.

This not an act of sympathy toward employees who have been locked out. Early on, the Board acknowledged that the use of replacements during a lockout robs employees of any bargaining position, making "the necessary, if not the almost inevitable tendency of the employer's affirmative conduct . . . capitulation on the part of the employees and their representative." **Ruberoid,** *supra*, at 993. "[N]ot all economic weapons seriously affecting employee rights may be employed with impunity merely because [they are] employed in aid of an employer's bargaining position," *Id.*; **Local 155, International Molders v. NLRB,** (DC Cir. 1971), 442 F. 2d 742.

Within the context of industrial realities, then, the Board has correctly distinguished between the coercive effect of a

simple lockout and the added impact of continued operations through the use of replacements. Thus, the Board opposed the Employer's petition for certiorari in **Inland Trucking** on the basis of **NLRB v. Great Dane Trailers,** 388 US 26 and **NLRB v. Fleetwood Trailers,** 388 US 26 and **NLRB v. Fleetwood Trailers,** 389 US 375, suggesting that "it is proper to conclude that the employer's action violated Section 8 (a)(1) and (3) . . . even without specific proof of anti-union motivation." National Labor Relations Board's Brief to the United States Supreme Court, Docket No. 71-189, page 6.

In short, the Board's consistent position until the issuance of the decision in the instant case has been that the use of replacements to continue operations during a single employer lockout is a violation of the employees' Section 7 rights. Now, the Court of Appeals has rejected this position in a single sentence, simply stating that the record evidence was sufficient to support the "findings of fact and conclusions of law of the Board majority" (A. 1-2).

But there is no Board majority. Three of the Board's five members have accepted the principles enunciated in **Inland Trucking** and applied them to the instant case (A. 11, 13, 9). This means that:

> "Respondent's use of some replacements to continue partial operation was inherently destructive of the rights of its regular employees. . . . [Further,] on the basis of the [Court's] second criterion [i.e., a demonstration of the economic necessity for the use of replacements]. . . . Respondent has not presented 'evidence of legitimate and substantial justification' for its conduct" (A. 13).

However, Chairman Miller has left the two senior board members and joined in the minority's result, arguing that the **Inland Trucking** rule to which he proclaims adherence does not apply if there is some equivocation as to the Employer's subjective

motivation. In the end, the "majority" which the Court below sustained was one man's effort to accept a clear rule and avoid it at the same time.

Again, the Chairman's emphasis on business justification is clearly misplaced. Respondent had a continuing, year-round commitment from its customers; there was no seasonal peak which had to be protected, as in **American Ship Building Co. v. NLRB,** 380 US 300; **Inter Collegiate Press,** *supra*, and **Inland Trucking** (where the Employer was trying to retain ready-mixed concrete customers during Wisconsin's short construction season, 179 NLRB 353-354); Respondent had no goods to protect from destruction, as in **Betts Cadillac Olds, Inc.,** 96 NLRB 268; no multi-employer bargaining group to preserve, as in **NLRB v. Brown,** 380 US 278; nor any product spoilage to avoid, as in **Duluth Bottling Association,** 48 NLRB 1335. Here, as in **Inland Trucking,** the Employer was simply trying to preserve customers, but this claim is even weaker than that which the Board rejected when offered by the ready-mix companies in **Inland Trucking**, for Respondent does not have their problems of a short season.

The decision in **American Ship Building Co.,** *supra* and **Brown,** were carefully limited rulings on the kind of employer conduct which might be permitted in particular bargaining situations. 380 US at 307, 308, n. 8. Viewed as a reevaluation of the economic weaponry permissible in a labor dispute, the two decisions have been taken to represent a "judgment [that] the employer should not be denied the strategic advantage of picking the time of battle" and that "to defend against a whipsaw strike, the employer needs to have the added weapon of hiring temporary replacements." Summers, **Labor Law in the Supreme Court: 1964 Term,** 75 Yale L. J. 59 (1965) 72. Against this background, **Brown** treated the use of work replacements during a lockout as a permissible defense of a multi-employer unit, emphasizing that replacements could be

used in that situation because they were necessary to protect the unit from fragmentation: The employers who locked out would be at a disadvantage because the struck employer could continue operating, and the practical result was an effective whipsaw against the unit's locking out employers instead of the struck firm. *Id.*, at 284-285, 293-294.

However, unlike the "balance" accepted by the Court below, **Brown** and **American Ship Building** acknowledge that employer's capacity to destroy union militancy through continued operations during a lockout. In contrast to a struck employer, the locking out employer is not acting defensively, but has maneuvered a situation in which he may receive the benefits of continued operations while refusing his regular employees the opportunity to work even if they abandon the union cause. Oberer, **Lockouts and the Law: The Impact of American Ship Building** and **Brown Food,** 51 Cornell L. Q. 193 (1966) 221-222. Thus, without the whipsaw problem, the lockout weapon is an extreme and the use of work replacements to support that tactic is simply unjustifiable. **Inland Trucking,** *supra*; **Ruberoid,** *supra*; **Local 155, Molders,** *supra*.

In the end, the issue is whether an Employer's desire to retain customers, a desire which has never before been treated as a permissible excuse for otherwise unlawful conduct, can now be transformed into an allowable basis for imposing pressures inherently destructive of statutory rights. All companies try to maintain sales; all companies hope to avoid losing customers; there is nothing special about this position. Unlike the lockouts to avoid property destruction or to preserve a multi-employer bargaining unit, this employer's lockout was solely designed to bring pressures upon employees bargaining for a new contract. The addition of continued operations through work replacements meant the employees could not work, even if they individually abandoned their union's position (as would have been the case in a strike); the only choice for these employees was

a unanimous capitulation or an indefinite, apparently endless, period of unemployment.

This penalty was imposed only to suit the Employer's convenience and to chill the Union's militant bargaining position. It was, *per se*, a violation of employee rights.

CONCLUSION

For the reasons stated, this Petition should be granted.

Respectfully submitted

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APPENDICES

APPENDIX A

Nos. 72-1590 & 72-1700

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
AUG 27 1973
JAMES A. HIGGINS, Clerk

OTTAWA SILICA COMPANY, INC., Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent, and CYLINDER GAS, ETC., EMPLOYEES LOCAL NO. 283 TEAMSTERS, Intervenor.	ORDER
CYLINDER GAS, ETC., EMPLOYEES LOCAL NO. 283 TEAMSTERS, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent, and OTTAWA SILICA COMPANY, INC., Intervenor.	

Before: WEICK, EDWARDS and KENT,* Circuit Judges.

On receipt and consideration of the briefs, oral arguments and record in the above-styled case; and

Finding substantial evidence on the whole record in the unique circumstances of this case to support the

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* Judge Kent participated in the argument of this case but died on May 28, 1973, before judgment was entered.

findings of fact and conclusions of law of the Board majority,

Enforcement of the Board's order is granted to the extent outlined in the Decision and Order of the National Labor Relations Board, 197 N.L.R.B. No. 53 (1972).

Entered by order of the Court

Clerk

APPENDIX B

197 NLRB No. 53 D—6365 Rockwood, Mich.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

OTTAWA SILICA COMPANY

and

Cases 7—CA—8018(1)
7—CA—8018(3)

CYLINDER GAS, CHEMICAL, PETROLEUM, AUTO SERVICE AND ACCESSORY DRIVERS, MAINTENANCE, MECHANICS, HELPERS AND INSIDE EMPLOYEES LOCAL NO. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On May 28, 1971, Trial Examiner Max Rosenburg issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The Board granted oral argument which was held on October 4, 1971, with the parties participating therein.

The Board has considered the record and the Trial Examiner's Decision, brief, and oral argument and has decided to affirm the Trial Examiner's rulings, findings, and conclusions only to the extent consistent herewith.

The Trial Examiner found that Respondent violated Section 8(a)(1) and (3) of the Act when, on June 1, 1970, it locked out its employees at its Rockwood, Michigan, plant and continued to operate that facility with temporary replacements. He further found that Respondent violated Section 8(a)(1), (3), and (5) by its unilateral refusal to award holiday and vacation pay to the locked-out employees

197 NLRB No. 53

until after the parties had completed negotiations on a new collective-bargaining agreement. The Trial Examiner dismissed that portion of the complaint which alleged that Respondent violated Section 8(a)(1), (3), and (5) by unilaterally deviating from the terms of a recently expired contract with the Union in withholding guaranteed workweek pay. A majority of the Board disagrees with the Trial Examiner's lockout findings [1] and the Board unanimously adopts his findings as to the withholding of guaranteed workweek pay and holiday and vacation pay. [2]

With respect to the lockout and continued operation with replacements, in reliance on the Board's decision in Inland Trucking Co. and Pooley Mailahn Co-Partners d/b/a Oshkosh Ready-Mix Co., 179 NLRB 350, enfd. 440 F.2d (C.A. 7), the Trial Examiner reasoned that by utilizing temporary labor to perform the duties of employees whom it had locked out Respondent interfered with, restrained, and coerced unit employees in the exercise of rights guaranteed by Section 7 of the Act, and concomitantly discouraged membership in the Union by discrimination against them in respect to their hire and tenure of employment, without legitimate and substantial justification, in violation of Section 8(a)(1) and (3) of the Act. In so holding, the Trial Examiner rejected the General Counsel's initial thesis that Respondent's lockout, when viewed in the light of continued operations by the utilization of temporary replacements, inherently destroyed important rights of its employees and constituted a per se violation of Section 8(a)(1) and (3). He found, rather, that the Employer, having somewhat intruded on its employees' Section 7 rights, had failed to adduce sufficient evidence to establish the economic legitimacy of the lockout. In the light of Respondent's acknowledgement that its lockout, coupled with the use of temporary replacements, caused "some" impingement on rights guaranteed to unit employees under

1/ Chairman Miller sets forth his reasons therefor in a separate concurrence.
2/ While we agree with the Trial Examiner in finding the violations as to vacation and holiday pay, we adopt his reasoning respecting the latter only to the extent that it assumes the lawfulness of the lockout.

the Act, the Trial Examiner considered that the only inquiry remaining for him was whether Respondent had carried its burden of proof that it was motivated by legitimate objectives. He concluded that the Respondent had not carried its burden in this regard.

For the reasons hereinafter indicated, we are unable to agree with the Trial Examiner's disposition of the lockout issue posed in this case. We start with the decision of the United States Supreme Court in American Ship Building Co. v. N.L.R.B., 380 U.S. 300 (1965), in which the Court made clear that an employer violates neither Section 8(a)(1) nor Section 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position. The Court pointed out that the lockout is not "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent anti-union animus." 380 U.S. at 309. The Court observed that the lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage. It is true, said the Court, that recognition of the lockout deprives the union of exclusive control of the timing and duration of work stoppages calculated to influence the result of collective-bargaining negotiations, but there is nothing in the statute which would imply that the right to strike "carries with it" the right exclusively to determine the timing and duration of all work stoppages. The Court could not see the employer's use of a lockout solely in support of a legitimate bargaining position as being in any way inconsistent with the right to bargain collectively or with the right to strike.

With respect to Section 8(a)(3) of the Act, the Supreme Court, in American Ship Building, observed that where the purpose and effect of the lockout are only to bring pressure upon the union to modify its demands its use does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise to discriminate against union members as such. Concluding that it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest, the Court rejected the Board's finding of a violation of Section 8(a)(1) and (3).[3/] Prior to American Ship Building, in N.L.R.B. v. Truck Drivers Local Union No. 449 (Buffalo Linen), 353 U.S. 87 (1957), the Supreme Court had held that the right to strike was not so absolute as to deny self-help by employers when legitimate interest of employees and employers collided, and that the ultimate problem was the balancing of the conflicting legitimate interest. 353 U.S. at 96.

In N.L.R.B. v. Brown, et al., d/b/a Brown Food Stores, 380 U.S. 278 (1965), the Supreme Court reaffirmed its views stated in American Ship Building, which was decided on the same day, that a lockout is not an unfair labor practice simply because it is used by an employer to bring pressure to bear in support of his bargaining position after an impasse in bargaining negotiations has been reached. Having so held, the Court stated that it did not see how the continued operations of the employe

3/ In American Ship Building the Supreme Court made clear that, contrary to the views expressed in a concurring opinion filed in the case, it intimated no view whatever as to the consequences which would follow had the employer in that case replaced its employees with permanent replacements or even temporary help. 380 U.S. at 309, fn. 8.

there involved and their use of temporary replacements implied hostile motivations any more than the lockout itself; nor could the Court see how they were inherently more destructive of employee rights.

The Supreme Court expressly rejected the Board's argument in Brown Food Stores that justification for the inference of hostile motivation appeared in the respondents' use of temporary employees rather than some of the regular employees. The Court stated:

> . . . Continued operations with the use of temporary replacements may result in the failure of the whipsaw strike, but this does not mean that the employers' conduct is demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act. Certainly then, in the absence of evidentiary findings of hostile motive, there is no support for the conclusion that respondents violated §8(a)(1). [380 U.S. at 286.]

Similarly, the Court concluded that respondents did not violate Section 8(a)(3), observing that under that section both discrimination and a resulting discouragement of union membership were necessary, but the added element of unlawful intent was also required. The Court noted that in Buffalo Linen the employers treated the locked-out employees less favorably because of their union membership, and that this may have tended to discourage continued membership, but the Court rejected the notion that the use of the lockout violated the statute. It held that the discriminatory act was not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of union animus was necessary. 4/

4/ Prior Board decisions have permitted lockouts as means of exerting pressure on a union during collective bargaining. For example, lockouts have been held justified when used as "defensive" measures to preserve the economic interest of the employer, such as the prevention of business losses which could result from a union striking suddenly and unexpectedly. See, e.g., Betts Cadillac Olds, Inc., 96 NLRB 268, 286 (1951) (lockout to avoid injury to customer relations caused by a strike occurring while unfinished work was in the shop—"The pedestrian need not wait to be struck before leaping for the curb."); International Shoe Company, 93 NLRB 907 (1951) (lockout to avoid disruption of general operations caused by unexpected intermittent work stoppages in individual departments); Duluth Bottling Association, 48 NLRB 1335 (1943) (lockout to (Continued)

While the use of temporary nonunion personnel in preference to the locked-out union members was discriminatory, the Court observed that any resulting tendency to discourage union membership was comparatively remote, and that the use of temporary personnel constituted a measure reasonably adapted to the effectuation of a legitimate business end. "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful." 380 U.S. at 289.

Our analysis of the Supreme Court decisions in American Ship Building and Brown Food Stores leads us to the conclusion that in the instant case Respondent did not violate Section 8(a)(1) and (3) by locking out its employees and continuing to operate with temporary replacements. 5/ We are not persuaded by the record before us that Respondent's conduct did not constitute "a measure reasonably adapted to the effectuation of a legitimate business end." As in Brown Food Stores, the replacements were expressly used for the duration of the labor dispute only; thus, the displaced employees could not have looked upon the replacements as threatening their jobs. At most, the Union could be forced to capitulate and return its members to work on terms less

4/ avoid spoilage of materials by a sudden strike). As above noted, in Buffalo Linen the Supreme Court found proper a lockout when used by nonstruck members of a multiemployer bargaining unit in response to a "whipsaw" strike action against another member. In such situations, the employers were deemed to have a legitimate interest in the preservation of the bargaining unit; and, as noted in Brown Food Stores, a lockout with temporary replacements was sanctioned by the Supreme court. And, as shown above, an "offensive" lockout, intended merely to exert pressure on a union in the bargaining process, was approved by the Supreme Court in American Ship Building.

5/ We do not perceive anything in the language of the Supreme Court in Brown Food Stores to the effect that continued operation by use of the employers' own nonunit personnel is to be treated differently from the use of newly hired temporary replacement. Indeed, as we note above, the Court rejected the Board's argument that justification for an inference of hostile motivation appeared in the employers' use of "temporary" employees rather than the use of some of the "regular" employees. 380 U.S. at 285.

desirable than hoped for. The membership, through its control of union policy, could end the dispute and terminate the lockout at any time by agreeing to Respondent's terms and returning to work on a regular basis. It would appear that union members would have nothing to gain, and much to lose, by quitting the union. Under all these circumstances, we cannot say that Respondent's conduct had any great tendency to discourage union membership. As stated by the Supreme Court in Brown Food Stores, not only was the prospect of discouragement of membership comparatively remote, but the attempt to remain open for business with the help of temporary replacements was a measure reasonably adapted to the achievement of a legitimate end.

We see nothing in Respondent's conduct which would warrant a conclusion that it was motivated by any antiunion considerations or that it was intended to discourage the exercise of protected employee rights. We view the lockout here as having been used solely in support of Respondent's legitimate bargaining position. In such circumstances, it was not inconsistent with the right to bargain collectively nor with the right to strike. Having concluded that the resulting harm to employee rights by the lockout and continued operation by use of temporary replacements was comparatively slight, and being of the view that there is insufficient evidence of improper motivation, we hold that Respondent did not violate Section 8(a)(1) and (3).[6/]

Our evaluation of the principles governing employer lockouts coupled with continued operation with temporary replacements convinces us that the result reached in Inland Trucking does not give proper recognition to legitimate employer interests,

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6/ The Supreme Court's decision in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), does not constitute a dilution of the principles announced in American Ship Building and Brown Food Stores. Indeed, there the Court cites with approval its decisions in American Ship Building and Brown Food Stores. 388 U.S. at 34.

devoid of any motive to discourage the exercise of protected employee rights, which was the underlying factor in the Supreme Court's reasoning in American Ship Building. If we are to follow the logic of American Ship Building and Brown Food Stores, we are precluded from inferring antiunion motivation solely from the application of economic pressure during the bargaining dispute. 1/ We see nothing more than that here and, accordingly, we decline to apply the holding in Inland Trucking to the facts of this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and orders that Respondent, Ottawa Silica Company, Rockwood, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order as modified:

Substitute the attached notice for that of the Trial Examiner.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C. JUN 16 1971

Ralph E. Kennedy, Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

1/ See Lockouts--Employers' Lockout with Temporary Replacements Is An Unfair Labor Practice, 85 Harv. L. Rev. 680.

2/ We do not view the fact that in Brown Food Stores a whipsaw strike was involved as requiring a conclusion contrary to that reached by the majority here or militating against a finding that Section 8(a)(1) and (3) is not violated when an employer locks out his employees and continues operation by temporary replacements to bring pressure to bear in support of his bargaining position after an impasse in negotiations has been reached in circumstances other than a whipsaw strike. We are unable to perceive anything in Brown Food Stores as limiting its holding only to whipsaw strikes.

CHAIRMAN MILLER, concurring separately:

I concur in the result reached by Members Kennedy and Penello, but wish to make clear that I do so only because (1) Respondent utilized only its own nonunit personnel in carrying on its operations during the lockout, (2) the Union had refused to provide any assurance of continued operations, and there was therefore reason to believe that a strike was imminent, and (3) there was here some evidence, although perhaps not totally conclusive evidence, of a bona fide business justification for Respondent's actions.

The combination of all of these circumstances leads me to find no violation in Respondent's carrying on limited operation during the lockout through the use of nonunit personnel.

I wish particularly to note that I do not intend my conclusions in this case to be understood as sanctioning the utilization of temporary replacements, particularly when hired from the outside, in all permissible lockout situations. Thus to the extent that my colleagues intend, by their readiness to overrule Inland Trucking Co. and Wesley Meilahn Co-Partners d/b/a Oshkosh Ready-Mix Co., 179 NLRB 350, enfd. 440 F.2d 562 (C.A. 6, 1971), cert. denied 404 U.S. 858 (1971), to indicate a contrary view, I would dissociate myself from their rationale.

In addition, I agree with the Trial Examiner's findings as to the withholding of guaranteed workweek pay and vacation and holiday pay.

Dated, Washington, D.C. JUN 19 1972

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBERS FANNING AND JENKINS, concurring in part and dissenting in part:

Contrary to our three colleagues, we would, for reasons given below, affirm the Trial Examiner's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by locking out its regular employees on June 1, 1970,[9] and using temporary replacements partially to continue operation of its Rockwood, Michigan, plant.[10]

On March 16, George Vitale, the Union's vice president and chief negotiator, advised Charles Ehestis, Respondent's industrial relations manager, that the Union wished to renegotiate the provisions of their agreement which was to expire on May 31. In the course of the bargaining sessions which took place in the latter half of May, the Union threatened to strike. The final bargaining session began on May 31 and ended in an impasse on "all outstanding issues" about 1:30 a.m. on June 1. Respondent's supervisors then notified the employees who had reported for the night shift that their services would not be needed and that the 72 production and maintenance employees would be locked out until further notice. However, as indicated above, Respondent, which produces silica sand for sale to foundries and glass container manufacturers, continued to serve the latter by using 23 temporary replacements drawn from supervisory and sales personnel at the Rockwood facility and Respondent's Ottawa, Illinois, plant.

During the month of May, Eldon B. Zwayer, director of purchasing for Federal Glass Company, a major customer whose total requirements had been met since 1950 by Respondent, "checked" with Terrance V. Davis, Respondent's division manager,

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9/ Unless otherwise indicated, all dates below are for the year 1970.

10/ Our colleagues adopt the Trial Examiner's dismissal of the allegations concerning the withholding of guaranteed workweek pay and his finding that Respondent unlawfully withheld vacation and holiday pay. We agree. However, contrary to Members Kennedy and Penello, we would not restrict the basis for finding the violation as to holiday pay.

about the status of Respondent's "labor negotiations" with the Union. According to Zwayer, who testified on behalf of Respondent, Davis and he telephoned each other and "discussed what the situation was and what the possibilities were and what they could do to take care of us in the event there was any problem during the negotiations." In their first conversation concerning a possible work stoppage, Davis stated he was not certain what might happen in the negotiations, but Davis assured Zwayer that "in any event, they [Respondent] would be able to continue . . . to supply" Federal Glass. Davis repeated this assurance in subsequent conversations, and late in May told Zwayer that "in the event there was a work stoppage or a strike they [Respondent] would continue to operate with supervisory employees and would ship to us." Satisfied with these assurances, Zwayer did not then seek an alternate supply of silica sand because "we felt we had an adequate supply [from] a supplier who had always supplied us very well with the quality we wanted. . . ."

The issue posed in the instant case was given judicial attention and decided for the first time in Inland Trucking, supra, by the Court of Appeals for the Seventh Circuit. We subscribe to the legal principles enunciated therein and consider it significant that the circuit court's decision remained intact when an appeal therefrom was denied by the Supreme Court. As Chairman Miller indicates in his concurring opinion that he, too, subscribes to Inland Trucking, it is clear that a majority of the Board desires to abide by that decision.

The Seventh Circuit reasoned as follows:

Although the Supreme Court held in American Ship Building, supra, that it was not unlawful for an employer temporarily to shut down his plant and lay off his employees "for the sole purpose of bringing economic pressure to bear in support of his

legitimate bargaining position," the Supreme Court issued a caveat: "we intimate no view whatsoever as to the [legal] consequences which would follow had the employer replaced its employees with permanent . . . or even temporary replacements."

The circuit court also held that Brown Food Stores, supra, which was handed down by the Supreme Court on the same day as American Ship Building, does not provide a basis for finding it legally permissible for an employer to operate with "replacement employees to accompany an offensive . . . lockout." In so holding, the circuit court found that Brown Food Stores involved a "special [situation] in which the replacement measures taken by the employers were . . . deemed justified by particular circumstances as fair defensive responses to a situation precipitated by a [whipsaw] strike. . . ."

The circuit court thereupon invoked the Supreme Court's subsequent decision in Great Dane Trailers, supra, which set forth the following criteria for determining the propriety of an employer's conduct:

> . . . First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U.S. at 34.]

The circuit court then found as follows on the basis of the first test:

> We conclude that the bargaining lockout, which was held in American Ship not to be inconsistent with protected employee rights, does become so if the employer does not shut down, but continues operation with temporary replacements. Such lockout forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued

> operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and content of that right . . . . [440 F.2d at 564.]

After ruling that the lockout plus use of replacements to continue operation was inherently destructive of the protected rights of the locked-out employees, the circuit court also held that even if the second test was applied, the employer was unable to meet that test because it did not "come forward with the evidence of legitimate and substantial business justification" for its continued operation during its "offensive lockout."

Applying the first criterion to the instant case, we would find in accord with the court's reasoning in Inland Trucking that Respondent's use of some replacements to continue partial operation was inherently destructive of the rights of its regular employees. We would also find on the basis of the second criterion that Respondent has not presented "evidence of legitimate and substantial justification" for its conduct.

As noted above, Chairman Miller constitutes with us a Board majority for the proposition that Inland Trucking correctly sets forth the legal principles which are applicable to the issue herein. Having signified his willingness to abide by those principles, Chairman Miller nevertheless concurs with Members Kennedy and Penello in finding Respondent's conduct lawful. In doing so, Chairman Miller fails to take cognizance of the inherently destructive character of that conduct and errs by relying on a jerry-built combination of three factors to support his departure from the rationale of Inland Trucking; namely, (1) Respondent's utilization of its own nonunit personnel as replacements, (2) the Union's refusal to provide any assurances

of continued operations, and (3) some evidence, although perhaps not totally conclusive, of a bona fide business justification for Respondent's actions.

As to (1), it is clear that the coercive impact on the locked-out employees and t advantage to Respondent of continued operation would be just as great regardless of whether the temporary replacements are drawn from Respondent's plants or outside sources. As to (2), there is nothing in Inland Trucking which permits the Board to hold that the Union's refusal to assure continued operation would in any way justify Respondent's conduct. Although the Supreme Court in American Ship Building held that an employer has the right to determine the timing and duration of a simple lockout, the court did not in any way indicate that that right extends to a lockout which is accompanied by use of temporary replacements. As to (3), Chairman Miller concedes that the evidence as to Respondent's business justification is far from conclusive. A close examination of the evidence presented by Respondent shows that in fact it had little economic justification for its conduct. Thus, as noted above, Zwayer, the director of purchasing for an important customer of Respondent, received repeated assurances that Respondent could and would continue to operate in the event of a strike because Respondent had prepared a contingency plan for operation with replacements should such an eventuality occur. Indeed, Respondent concedes in its brief to the Board that its business was not "endangered by its actual failure to ship sand to its customers"; instead, Respondent limited the defense of its conduct to the claim that what was at stake was the risk of its "loss of reputation of reliabilit in maintaining shipments in the face of an imminent labor dispute." That claim must fall in view of Respondent's assurances to Zwayer that it would be able to continue shipments if a strike should occur.

We turn now to the opinion of Members Kennedy and Penello who find that Respondent's conduct had a legitimate business purpose. In so holding, they improperly rely on American Ship Building and Brown Food Stores which, as noted above, respectively deal only with a simple lockout, i.e., a complete shutdown, and a special case involving a defensive response to a situation precipitated by a whipsaw strike. They make the unwarranted leap from those decisions to the entirely different situation presented in the instant case without adequate supporting reasoning even though, as our colleagues themselves concede, the Supreme Court explicitly stated in American Ship Building, with full awareness of its Brown Food Stores decision, that it was limiting its holding to a classic lockout situation and was expressing no view as to the legal propriety of continued operation with replacements of locked-out employees.

Members Kennedy and Penello also cite Great Dane Trailers with approval. Yet they fail to provide a persuasive explanation as to how the criteria set forth therein lead to their conclusionary finding that Respondent's conduct was justified by business considerations. Finally, they do not accord appropriate weight to the Supreme Court's denial of the petition for certiorari in Inland Trucking.

As we have already stated in our discussion of Chairman Miller's concurrence, the application of the criteria in Great Dane Trailers and Inland Trucking in our opinion compels the conclusion that Respondent's conduct was not only inherently destructive of protected employee rights but was also without sufficient economic

justification. Accordingly, we would find in agreement with the Trial Examiner that Respondent's lockout and concomitant operation with replacements violated the Act.

Dated, Washington, D.C.

JUN 13 1972

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in Cylinder Gas, Chemical, Petroleum, Auto Service and Acessory Drivers, Maintenance, Mechanics, Helpers and Inside Employees Local No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America by withholding accrued holiday and vacation benefits from his employees for exercising rights guaranteed to them under the National Labor Relations Act, as amended.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

All our employees are free to become or refrain from becoming members of the above-named Union or any other labor organization.

OTTAWA SILICA COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 4822 , Telephone 313--226--3200.

TXD-294-71

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

OTTAWA SILICA COMPANY

and

Cases Nos. 7-CA-8018 (1)
7-CA-8018 (3)

CYLINDER GAS, CHEMICAL, PETROLEUM,
AUTO SERVICE AND ACCESSORY DRIVERS,
MAINTENANCE, MECHANICS, HELPERS AND
INSIDE EMPLOYEES LOCAL NO. 283,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA

ERRATA

The location of Respondent's business in the above-captioned proceeding, which appears on page 2, line 11, page 12, line 19, and page 13, line 14, of the Trial Examiner's Decision herein, shall be changed to read from "Rockwood, Illinois" to "Rockwood, Michigan."

Max Rosenberg
Trial Examiner

Dated: June 10, 1971

TXD-294-71
Detroit, Mich.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

OTTAWA SILICA COMPANY

and

Cases Nos. 7-CA-8018 (1)
7-CA-8018 (3)

CYLINDER GAS, CHEMICAL, PETROLEUM, AUTO SERVICE AND ACCESSORY DRIVERS, MAINTENANCE, MECHANICS, HELPERS AND INSIDE EMPLOYEES LOCAL NO. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Lucian J. Henry, Esq., of Detroit, Mich., for the General Counsel.
James P. Hoffa, Jr., Esq. (Hoffa & Chotek), of Detroit, Mich., and Goldberg, Previant & Uleman, of Milwaukee, Wis., for the Charging Party.
Gerald S. Patterson, Esq. and George W. Mahlenhof, Esq. (McDermott, Will & Emery), of Chicago, Ill., for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

MAX ROSENBERG, Trial Examiner: With all parties represented, this proceeding was heard before me in Detroit, Michigan, on January 21 and 22, 1971, pursuant to an amended complaint filed by the General Counsel of the National Labor Relations Board and an answer filed thereto by Ottawa Silica Company, herein called the Respondent. 1/ The issues raised by the pleadings relate to whether the Respondent violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, by certain conduct to be detailed hereinafter. At the conclusion of the hearing, the parties waived oral argument. Briefs have been received from the General Counsel and the Respondent, which have been duly considered.

1/ The charge in Case No. 7-CA-8018 (1) was filed on June 17, 1970 and served on June 19, 1970, while the charge in Case No. 7-CA-8018 (3) was filed on July 9 and served on July 11, 1970. On July 17, 1970, a charge was lodged (Continued)

Upon the entire record made in this proceeding, including my observation of the witnesses who testified on the stand, I hereby make the following:

Findings of Fact and Conclusions

I. The Respondent's Business

Respondent, a Delaware corporation with its principal office and place of business in Ottawa, Illinois, maintains an office and place of business in Rockwood, Illinois. In addition, Respondent operates other plants in the States of California and Connecticut. In the course and conduct of its business operations, Respondent manufactures, sells and distributes silica sand and related products. The Rockwood plant is the only facility involved in this proceeding. During the annual period material to this proceeding, Respondent sold and distributed at its Rockwood plant products valued in excess of $500,000, of which products valued in excess of $50,000 were shipped from said plant directly to points located outside the State of Michigan. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is undisputed and I find that Cylinder Gas, Chemical, Petroleum, Auto Service and Accessory Drivers, Maintenance, Mechanics, Helpers and Inside Employees Local No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehouse and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The General Counsel contends that Respondent violated Section 8(a)(1) and (3) of the Act when, on June 1, 1970, 2/ it locked out its employees at the Rockwood plant and continued to operate the facility with temporary replacements. He further maintains that Respondent violated Section 8(a)(1), (3) and (5) by its unilateral refusal to award holiday and vacation pay to the barred employees until after the parties had completed negotiations on a new collective-bargaining agreement. Finally, the General Counsel asserts that Respondent offended the provisions of Section 8(a)(1), (3) and (5) by unilaterally deviating from the terms of a recently expired contract with the Union in withholding guaranteed workweek pay. For its part, Respondent denies the commission of any labor practices proscribed by the Statute.

1/ (Continued) in Case No. 7-CB-2208 which was served on July 19, 1970, and a consolidated complaint based upon these charges issued on November 27, 1970. However, immediately prior to the commencement of the hearing herein, the Regional Director for Region 7 issued an order severing Case No. 7-CB-2208 from the other Cases in this proceeding because an agreement had been executed by the parties settling the matters raised by the "CB" charges.

2/ Unless otherwise indicated, all dates herein fall in 1970.

It is undisputed and I find that, on May 19, 1967, the Union was certified by the Board as the exclusive bargaining agent for an appropriate unit of all production and maintenance employees at Respondent's Rockwood plant. 3/ On June 1, 1967, Respondent and the Union entered into a labor agreement covering the wages and terms and conditions of employment for the unit personnel which was geared to expire on May 31. On March 16, George Vitale, the Union's vice president and chief negotiator, dispatched a letter to Charles Huestis, Respondent's industrial relations manager, advising that the Union desired to renegotiate the provisions of the outstanding contract. After receiving this communication, Huestis telephoned Vitale in April and a bargaining session was scheduled for May 15. Prior to May 15, the Union sent to Respondent a series a written contract proposals and, at the inception of the negotiations on that day, Respondent submitted its counter-proposals.

The parties met again on May 25, at which time Stephen Schultz, the Union's president, joined Vitale on the negotiating team. Huestis testified without contradiction and I find that, during this bargaining colloquy, Schultz remarked that "the company was going to pay, and pay through the nose. He said that if there was a strike the union would strike the company everywhere it operated . . . ." Schultz added that "if the company was going to make money during the strike then he guessed that's what they would have to do," and he suggested that "perhaps the parties should revert to the old days when a labor agreement consisted of a wage schedule and a description of vacation and holiday benefits, and the union was free to strike over everything else." Following these comments, Schultz quit the bargaining table and Respondent's negotiators commenced to caucus. At the conclusion of the recess, Vitale announced that "the time was getting short; that the company had not given the union a guarantee of retroactivity, and that the company had made only proposals which were designed to take things away from the employees, and that we weren't going to get these things out of the contract without a strike. And further that the company to that point had not made any economic offers."

The next meeting of significance took place on May 29. Shortly after the session convened, Huestis reminded those present that "time was getting short at that juncture; with the contract expiring two days later that we were confronted with a contract deadline; and at that time we would be confronted with a strike or a lockout." Huestis thereupon presented to Vitale three new economic proposals. After digesting Respondent's offers, Vitale responded that "If that's all you've got you're going to get a strike" and he noted that the Union's negotiating committee "was empowered to call a strike." At the end of the session, Huestis requested that the current agreement be extended for a week to allow for further consideration of the unresolved issues, but Vitale insisted that any extension be on a day-to-day basis. The session then terminated.

Another meeting was conducted on May 31, the terminal date of the existing contract. At the outset of the convocation, Huestis again reminded the assemblage that less than 12 hours remained before the contract's expiration. According to Huestis' testimony, Vitale had asked for Respondent's final offer as to all issues throughout the negotiations and repeated his demand on this occasion. In response, Huestis spelled out the final proposals and wrote them on a blackboard. Upon receiving

3/ Prior to the certification, and since 1940, Respondent's employees had been represented by the United Glass and Ceramic Workers of North America, AFL-CIO.

this information, Vitale stated "If that's your final offer we'll take it to the membership." Vitale thereupon requested seventy-five copies of Respondent's proposed agreement because "he wanted to take it to the membership so he could show them the conditions under which the company was asking the employees to work." When Huestis inquired whether Vitale would recommend to his members that the proffered agreement be ratified, the latter replied that he would urge the membership to reject the contract. Vitale's version of the events which transpired at this meeting was generally corroborative of Huestis'. However, he insisted that, when Huestis inquired whether Vitale would recommend to the membership that the Respondent's proposed contract be accepted, he informed Huestis that he would make no recommendation one way or the other. 4/ At this juncture, Huestis advised Vitale that the unit employees would be sent home "until you either accept or reject" Respondent's proposals. The meeting broke up at approximately 1:30 a.m. on June 1. Coincident thereto, Respondent's supervisors notified the employees who had reported for the night shift which began at 11:00 p.m. that their services would not be needed and that they would be locked out until further notice. However, they were compensated for the time spent at the plant that evening. I further find that at least one employee was informed by Respondent that he would be replaced by supervisors during the lockout. The parties stipulated and I find that, at all times prior to the lockout on the morning of June 1, Respondent faithfully discharged its statutory duty to bargain in good faith with the Union. 5/

The parties stipulated and I find that, after the lockout on June 1, Respondent continued to operate its Rockwood facility by temporarily replacing the unit employees with supervisory personnel then employed at Rockwood, supervisors imported from its Ottawa, Illinois, plant, as well as sales personnel. It is uncontroverted and I find that at no time during the course of the lockout did the Respondent hire individuals to staff the ranks of the temporary replacements. I also find that, whereas the unit employees numbered seventy-two immediately prior to June 1, Respondent continued operations after the lockout with a reduced cadre of twenty-three supervisory and sales personnel.

The lockout remained in effect until late afternoon on June 5, at which time Huestis sent a telegram to Vitale advising that "work will be available to all bargaining unit employees . . . at Rockwood . . . at the start of the regular workweek commencing at 11:00 p.m., Sunday, June 7, 1970, under the same terms and conditions of employment as existed on May 31, 1970. All employees will be expected to report for work on their regularly scheduled shifts. The company continues to be available to meet with the union at a mutually agreeable time to continue our negotiations." On June 6, Respondent dispatched a telegram to each of the affected employees which recited "Lock out ended. All employees are scheduled for regular shifts for workweek starting 11 PM June 7, 1970." On the same date, Respondent provided the Union with the requested number of printed copies of Respondent's contract proposals. The following afternoon, the Union conducted a

4/ I do not credit Vitale's testimonial assertion that he indicated to Huestis that he would be noncommittal in his recommendation to the membership regarding ratification of Respondent's final offer, in light of Vitale's utterances that he was dissatisfied with that offer and that he desired copies of Respondent's proposals in order to take them "to the membership so he could show them the conditions under which the company was asking the employees towork."

5/ It was agreed by the parties and I find that Respondent had never been charged with violations of the Act prior to the institution of these proceedings.

membership meeting during which the Respondent's contract offer was rejected and an affirmative vote to strike was taken. On June 8, the Union established a picket line at the plant. As a result of the work stoppage, truckers refused to cross the picket line and load materials to satisfy customer sales. Despite the strike, collective bargaining continued. The labor dispute terminated on October 25 with the successful negotiation of a new labor agreement and all strikers were recalled to work. On November 4, the parties executed a settlement agreement which reduced the contract to writing.

The General Counsel acknowledges that Respondent's lockout of its employees on June 1 did not, standing alone, constitute a violation of any provision of the Act. However, he asserts that, when accompanied by the use of temporary replacements, the employment exclusion of the unit personnel was so inherently destructive of their fundamental rights that this combined action offended both Section 8(a)(1) and (3). Alternatively, the General Counsel argues that Respondent's lockout was legally tainted, even in the conceded absence of direct evidence of antiunion considerations, because the employees suffered some degree of statutory hurt by their temporary replacement which Respondent failed to excuse with evidence of substantial business necessity. Respondent, on the other hand, argues that any discriminatory effect upon its employees' statutory rights occasioned by the lockout and replacements was privileged when viewed against the backdrop of the proven legitimate and overriding business conditions which then existed. In short, the General Counsel and the Respondent seek to pour their respective positions into the mold of legal principles enunciated by the Supreme Court in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 34. In that case, the Court noted:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

I am not persuaded by the General Counsel's initial thesis that Respondent's lockout, when buttressed by the utilization of temporary replacements to continue its operations, inherently destroyed important rights of its employees and constituted a per se violation of Section 8(a)(1) and (3). Recently, in Inland Trucking Co., et al., 179 NLRB No. 56, the Board had occasion to address itself to the issue of the legality of an employer's use of temporary replacements during an otherwise lawful lockout. After an extensive and thorough review of the prevailing precedents, the Board, in a summary adoption of the Trial Examiner's decision, concluded that the companies

there involved had violated Section 8(a)(1) and (3) of the Act. However, as I read that decision, the Board declined to hold that the temporary hiring of replacements during a lockout, without more, automatically demonstrated antiunion motivation which made the lockout statutorily proscribed, although this proposition had been forcefully advanced before that tribunal by the labor organization involved in that proceeding. Rather, the Board predicated its conclusion on the ground that the employer, having somewhat intruded on Section 7 rights, had failed to adduce suitable evidence to establish the economic legitimacy of the lockout. Accordingly, I conclude that Respondent did not engage in a per se violation of Section 8(a)(1) and (3) by locking out its employees on June 1 and continuing its operations with temporary replacements. 6/

Respondent, while conceding that its lockout and temporary replacements had some impact upon the protected rights of its employees, albeit slight, maintains that it has sustained the burden of showing that legitimate business exigencies warranted their curtailment. I turn to a consideration of this defense.

It is undisputed and I find that Respondent mines, processes and distributes silica sand at its plants in the United States. At the Rockwood installation, various grades and sizings of the sand are made. The process begins with the removal of the earth surface to expose the sandstone which is then blasted to free it from the deposit. Thereupon, it is crushed, dried, and separated by size. Subsequently, a portion of the sand is cooled and further separated into a different grade. Approximately 53 percent of the sand extracted at the Rockwood plant is sold to customers who utilize it in the manufacture of glass; 45 percent is vended to foundries; and, the balance finds its way to manufacturers of soap and wax. Because the silica sand mined from the Rockwood deposit contains an exceptionally low content of iron, a quality much preferred by manufacturers of glass, some of Respondent's customers have become totally dependent upon it for their supplies. For example, the Federal Glass Company has looked to Respondent as the former's exclusive source of supply from 1950 until August 5, when the customer discovered another supplier of sand with similar ferrous content.

Because of the unique relationship which it maintains with customers who are glass manufacturers, Respondent constantly communicates with them to keep them apprised of its supply capabilities. This regular dialogue is necessitated by the fact that glass producers operate their furnaces 7 days a week on a 24-hour schedule. Raw materials, including silica sand, are fed into the furnaces on a continuous basis in the production of molten glass. Once this continuity is interrupted by the inability to receive timely supplies of sand for the furnaces, glass manufacturers may incur untoward losses by the closure of the furnaces due to the fact that fixed costs for furnace deterioriation continue despite the shutdown, gas must be supplied to service them even though they are idle, and standby personnel must be utilized to tend the furnaces although they are not producing molten glass. During the period of a shutdown, a glass manufacturer may be compelled to lay off hundreds of

6/ I am not unmindful that, following the filing of petitions for enforcement and review of the Board's decision, the United States Court of Appeals for the Seventh Circuit, in enforcing that decision, ruled that "a lockout in the circumstances at bar, accompanied by continued operation with replacement labor, is, per se, an unfair labor practice" under Section 8(a)(1), and further noted that the employers' "lockouts plus use of replacements to continue operations /are/ inherently destructive of protected rights." _____ F. 2d _____ (C.A. 7), March 29, 1971, 76 LRRM 2929-31.

employees and suffer financial loss which, in some instances, may approximate $35,000 per day for each furnace which has been closed. 1/

Because of the economic injuries which might befall Respondent's customers in the event that it was unable to maintain a steady flow of silica sand, Respondent's action in locking its employees out was in substantial part prompted by the fear that it would lose sales to glass manufacturers to competitors if its supply-reliability became impaired. In this connection, Respondent anticipated a substantial reduction in sales to a plant operated by Owens-Illinois Glass Company in Brockport, New York, in the event Respondent failed to fulfill its delivery commitments, and did in fact suffer a loss of business when Federal Glass Company transferred a portion of its account to another supplier on August 5.

In light of Respondent's acknowledgement that its lockout, coupled with the use of temporary replacements, caused "some" impingement on rights guaranteed to unit employees under the Act, the only inquiry remaining is whether Respondent has carried its burden of proof that it was motivated by legitimate objectives, under the teachings of Great Dane Trailers, Inc., when it precipitated the lockout. After a careful review of the evidence, I am not persuaded that Respondent has carried the day on this score.

The primary thrust of Respondent's economic defense is that, faced with the threat of a strike and the Union's insistence on a day-to-day extension of the old contract, confronted with the obligation of supplying its glass producing customers with a steady stream of silica sand to forestall economic loss through a disruption of their production, and threatened with the defection of glass producers to competitors due to its inability to fulfill the customers' material needs, Respondent chose the tactic of the lockout and the temporary replacement of its workers. Respondent points out that, with the commencement of the lockout, it continued its operations with the substitution of only 32 percent of its normal work complement, hired no new replacements for its working supervisors, and acquired no new customers. However, this argument bears the seed of its own destruction. For, if Respondent has stayed its turn-key hand until the Union forced a work stoppage, Respondent could have continued to operate its business in the same fashion and to the same extent as it did after it embarked upon the lockout. In other words, it is not apparent on this record that Respondent would have been in any substantial sense more economically or business-wise inconvenienced by a strike on June 8 than it was when it voluntarily triggered a work stoppage of its regular employees by locking them out on June 1. Indeed, Respondent's business problems advanced in justification of its lockout action do not differ in any significant degree from those presented in Inland Trucking Company, et al., supra, where the Board held that these economic considerations were insufficient to establish that the employers therein were properly motivated in barring the plant door to the regular employees and employing temporary replacements to continue operations.

1/ During the lockout and ensuing strike, the Respondent expended its efforts almost exclusively in supplying its glass manufacturing customers who actually received 95 percent of their normal volume through shipments by rail. Foundry customers were relegated to a very minor priority primarily because they were supplied by independent truckers whose drivers refused to cross the Union's picket line when the strike began.

In sum, I am convinced and conclude that, by utilizing temporary labor to perform the duties of employees whom the Respondent had locked out on June 1, Respondent, under the circumstances here presented, thereby interfered with, restrained, and coerced the unit personnel in the exercise of their rights under Section 7 of the Act, and concommitantly discouraged membership in the Union by discrimination against them in respect to their hire and tenure of employment, without legitimate and substantial justification, in violation of Section 8(a)(1) and (3) of the Act.

As heretofore chronicled, the complaint alleges that Respondent violated Section 8(a)(1), (3) and (5) by unilaterally refusing to award accrued holiday pay, vacation pay, and guaranteed workweek pay to eligible employees. The facts are not essentially in dispute on these issues and I find them to be as follows.

Article VIII,Section 4 of the contract between the parties which expired on May 31 provided, in pertinent part, that "Holiday pay shall be paid only to employees who work the hours of work scheduled for them during the day preceding and the day following the holiday during the normal workweek unless previously excused by the Company." Respondent operates the Rockwood plant on a three-shift basis. The shifts extend from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. In 1970, Memorial Day fell on Saturday, May 30, and that day was classified as a holiday within the purview of the agreement. It was stipulated that all employees who worked on Sunday, May 31, and all employees who reported for the 11:00 p.m. to 7:00 a.m. shift on May 31, but who were sent home at 1:30 a.m. on June 1 due to the lockout, received pay for that holiday on June 8, the next regularly scheduled payday as well as the date on which the strike commenced. It was further stipulated that all employees who would have reported for work but for the lockout on the 7:00 a.m. to 3:00 p.m., and the 3:00 p.m. to 11:00 p.m. shifts on June 1 did not receive pay for the Memorial Day holiday until after the parties settled upon a new agreement, although Union Vice President Vitale requested that Respondent make such payment on June 6. 8/

Article VII, Section 1 of the old agreement relating to vacations stated that "The vacation period for employees, after their first year anniversary date as herein provided shall be from January 1 to December 31, both days inclusive, of each year." Section 5 provided that "An employee requesting to take a portion of his vacation as pay in lieu of time off shall be paid such pay at the time he takes his vacation; or if no vacation is taken, on his anniversary date." It was stipulated that employees customarily took vacations throughout the year after prior consultation and arrangement with their supervisors, and that Respondent did not maintain a policy of entirely shutting down its operations for vacation purposes. It was further stipulated that, between June 1, the date of the commencement of the lockout, and October 25, the date on which the strike terminated, Respondent refused to award any vacation pay to the qualified employees despite Vitale's request made to Respondent on June 6 that it do so. However, all eligible employees received their vacation pay by December 31.

8/ A similar holiday-pay eligibility provision was also embodied in the new agreement which was reduced to writing on November 4.

John Day, an employee who had worked for Respondent since 1954, was entitled to vacation pay during 1970. Around Easter time, and prior to the lockout, he applied for one of the 3 weeks of vacation entitlement and his application was granted. However, he deferred receipt of the vacation check until he planned to take the balance of his vacation. Although Vitale asked Respondent on June 6 to compensate the eligible employees for the vacation pay, Respondent refused to do so until the strike terminated in October.

Luther Miller was hired by Respondent in 1963. On or about May 8, he filled out an application form indicating that he desired to go on vacation between June 14 and June 26, and returned it to his supervisor. At the time, he inquired whether he could obtain his vacation pay on June 12 and the supervisor responded in the affirmative. Miller did not receive his check until after the strike had ended, despite Vitale's prior request for the money.

Floyd Williams was first employed at the plant on April 16, 1962. Sometime between June 8 and October 26, he informed Respondent that he wished to be paid for his accrued vacation leave in lieu of time off and was refused. However, he received the payment when the strike was concluded.

Article IV, Section 1(D) of the expired labor contract recited that "All employees who have been in the employ of the Company for a period of six (6) months or more shall be given one (1) week's notice, or one (1) week's pay in lieu thereof, if permanently laid off from employment due to reduction in force." Article VI, Section 2 goes on to state that "All employees shall be paid on the basis of a guaranteed workweek consisting of fourty (40) hours in consecutive days Monday through Friday." It was stipulated that no weekly guaranteed wage was paid to the locked out employees for the week of June 1 although Vitale had requested such payment on June 6.

With respect to its failure to award holiday pay for Memorial Day to those employees who did not work on the first two shifts of June 1, Respondent's defense, concisely stated in its brief, is portrayed in its assertion that "Employees who were denied holiday pay from June 1 to October 25 simply were not eligible under the prior agreement." It is, of course, quite true that employees who did not toil on June 1 would have forfeited their eligibility to the holiday pay if the disqualification resulted from their voluntary act. However, as I have heretofore found, the employees' absence from the plant on June 1 resulted, not from their volitional failure to comply with the existing "surrounding day" rule contained in the contract, but rather from Respondent's illegal lockout which led to their exclusion from work on that date. It requires no citation of precedent to support the conclusion which I here reach that an employer who, through the commission of unfair labor practices, causes economic hurt to his employees by withdrawing or withholding benefits already bargained for and accrued, runs afoul of Section 8(a)(3) of the Act. Moreover, even were I to have found that the lockout was sanctioned by prevailing law, the withholding of the holiday pay would nevertheless be condemned for, as the United States Court of Appeals for the District of Columbia observed in N.L.R.B. v. United States Pipe and Foundry Company, (--F.2d.-- decided January 5, 1971, 76 LRRM 2133). "While an employer may use its economic strength--its economic weapons--to pressure employees and their representative union to agree to

its terms, and while the withdrawal of benefits here was economic pressure for that purpose, when such a weapon as here was used is concomitantly 'inherently . . . prejudicial to union interests,' it becomes an unfair labor practice. American Ship Bldg. Co. v. N.L.R.B., 380 U.S. 300, 311." Furthermore, the unilateral denial of the accrued holiday pay, occurring not only during the lockout and strike, but while the parties were in the midst of collective bargaining for a new compact and while the Union remained the exclusive representative of the employees, was also violative of Section 8(a)(5) and I so conclude.

Regarding Respondent's refusal to pay accrued vacation benefits during the period of the strike, Respondent takes the position that this conduct was privileged because "the practice upon which vacation pay became payable was certainly not an established practice at the time (i.e., after June 1 and before October 25) the demands for vacations were made but was in the process of re-negoti The result of the re-negotiation, tentatively agreed upon before the lockout and strike, was that the Respondent was to have the exclusive right to schedule the timing of vacations and that employees were not entitled to pay in lieu of vacations until they were actually scheduled and taken." Respondent further points out that, in the new agreement executed on November 4, the parties agreed to a clause which read, "Effective January 1, 1971 vacation must be taken in the calendar year when due." Respondent's reliance on these factors can hardly serve as a defensive shield concerning the treatment of Floyd Williams. Williams' anniversary date fell on April 16, approximately a month before negotiations were undertaken. As to him, his right to vacation pay had already vested. It is no answer to say that, because the parties may have agreed upon a "different and inconsistent method of paying vacations prior to June 1" than that provided in the old contract, Williams was to be denied of his accrued rights by alleged proposals which had no contractual effect at the time when he made his vacation request. Accordingly, as in the case of the withholding of holiday pay in the period from June 1 to October 25 despite the Union's request for such payment on June 6, I conclude that Respondent's action in failing to compensate employees for accrued vacation pay until the strike had ended was violative of Section 8(a)(1), (3) and (5). See N.L.R.B. v. United States Pipe and Foundry Company, supra.

The General Counsel's final contention relating to Respondent's failure to award its locked out employees the weekly guarantee embodied in the expired contract for the period of the lockout needs no extensive discussion. To support his plea for such payment, the General Counsel equates the lockout with the phrase "permanently laid off due to reduction in force" as used in the old agreement, and maintains that Respondent's lack of appropriate notice of lockout obligates it to recompense the unit employees for wages lost during their debarment from the plant. That the lockout did not assume the dignity of a permanent reduction in force of the regular employees is evidenced by a variety of utterances and occurrenc Thus, when the employees who reported for the 11:00 p.m. on May 31, they were informed that they would be sent home until further notice and that their places would be filled by plant supervisors. During the lockout, the work was performed by supervisors and sales personnel whose positions had not been occupied by other replacements. The lockout persisted for only 5 days, after which all unit personnel were unconditionally offered reinstatement to their former jobs. Indeed, in its telegram of recall sent to the Union on June 5, Respondent told the Union that it "continued to be available to meet with the union at a mutually agreeable time to

continue our negotiations." Moreover, on the evening of May 31, Industrial Relations Manager Huestis informed the employees that they would be sent home "until you either accept or reject" Respondent's final offer. In light of the foregoing, I am convinced that the Union had ample reason to believe that the lockout was temporary in nature, and did not constitute a "permanent" reduction in force. In any event, I have heretofore found that the exclusion of the employees between June 1 and June 5 was discriminatorily motivated and hence illegal. In the remedial area of this opinion, I have recommended that Respondent be required to make the employees whole for any loss of pay they may have suffered as a result of this tactic.

Accordingly, I find and conclude that Respondent did not violate either Section 8(a)(1), (3) or (5) of the Act by its unilateral withholding of guaranteed weekly pay, and I shall dismiss these allegations from the complaint.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent illegally discriminated against its employees by locking them out on June 1, 1970 and hiring temporary replacements to man the work force at the Rockwood, Illinois, plant. I have also found that, on June 5, Respondent terminated the lockout and unconditionally offered to all locked out employees full reinstatement to their former positions commencing with the next regular work shift on June 7. I shall therefore only recommend that Respondent make all of the affected employees whole for any loss of pay they may have suffered by reason of the discrimination practiced against them by payment to each of a sum equal to that which he would normally have earned from the date of the lockout to the date of the offer of reinstatement, less net earnings during said period, if any. The backpay provided herein shall be computed in accordance with the Board's formula set forth in F. W. Woolworth Company, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum computed in the manner prescribed in Isis Plumbing & Heating Co., 138 NLRB 716.

Inasmuch as Respondent has already compensated all eligible employees for their accrued holiday and vacation pay, I shall make no remedial recommendations with respect to these items.

Upon the basis of the foregoing findings of fact and conclusions and the entire record in the case, I hereby make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER 9/

Ottawa Silica Company, of Rockwood, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Cylinder Gas, Chemical, Petroleum, Auto Service and Accessary Drivers, Maintenance, Mechanics, Helpers and Inside Employees Local No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by locking out employees and temporarily replacing them by other personnel without substantial and legitimate justification, thereby discriminating in respect to the hire or tenure of its employees.

(b) Discouraging membership in the foresaid labor organization by withholding accrued holiday and vacation benefits from its employees because they engage in activities protected by the Act.

(c) Unilaterally changing existing terms and conditions of employment of employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

9/ In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which I find will effectuate the policies of the Act.

(a) Make whole all employees locked out by Respondent for the period from June 1 to June 5, 1970, for any loss of pay they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(c) Post at its plant in Rockwood, Illinois, copies of the notice attached hereto and marked "Appendix." 10/ Copies of said notice, to be furnished by the Regional Director for Region 7, shall, after being duly signed by a representative of Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, what steps Respondent has taken to comply therewith. 11/

IT IS FURTHER RECOMMENDED that, except as hereinabove found, all other allegations in the complaint be dismissed.

Dated at Washington, D.C.

Max Rosenberg
Trial Examiner

10/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

11/ In the event that the Recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX TXD-294-71

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discourage membership in CYLINDER GAS, CHEMICAL, PETROLEUM, AUTO SERVICE AND ACCESSORY DRIVERS, MAINTENANCE, MECHANICS, HELPERS AND INSIDE EMPLOYEES LOCAL NO. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization, by locking out our employees and temporary replacing them with other personnel without substantial and legitimate justification, thereby discriminating in respect to the hire or tenure of our employees.

WE WILL NOT discourage membership in the above-named union by withholding accrued holiday and vacation benefits from our employees for exercising rights guaranteed to them under the National Labor Relations Act, as amended.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL pay all our locked out employees for the period from June 1 to June 5 for any loss of earnings they may have suffered as a result of the lockout.

All our employees are free to become or refrain from becoming members of the above-named Union or any other labor organization.

OTTAWA SILICA COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 500 Book Building, 1249 Washington Blvd., Michigan 48226 (Tel. No. 313-226-3200).

APPENDIX C

STATUTES INVOLVED.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 et seq.):

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Sec. 12. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

LIBRARY
SUPREME COURT, U. S.

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-807

CYLINDER GAS, CHEMICAL, PETROLEUM, AUTO-SERVICE AND ACCESSORY DRIVERS, MAINTENANCE, MECHANICS, HELPERS AND INSIDE EMPLOYEES LOCAL No. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
Petitioner

vs.

OTTAWA SILICA COMPANY
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT OTTAWA SILICA COMPANY IN OPPOSITION

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OPINIONS BELOW

The Decision and Order of the National Labor Relations Board are reported at 197 NLRB No. 53 and are

printed in Appendix B, A.3-34, of the Petition. The Order of the Court of Appeals has not yet been officially reported, but is printed in Appendix A, A.1-2, of the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1973. The Petition for Writ of Certiorari was filed on November 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1).

QUESTION PRESENTED

Whether the Board properly concluded that the Ottawa Silica Company's lockout of employees and use of temporary replacements to continue operations did not violate Section 8(a)(1) and (3) of the Act (29 U.S.C., §158 (a)(1)(3)).

STATUTES INVOLVED

The statutory provisions involved are Sections 7, 8 (a)(1), 8 (a)(3), of the National Labor Relations Act, as amended, 28 U.S.C., §151, et seq. (referred to as the "Act"). They are printed in Appendix C, infra, A. 35.

STATEMENT OF THE CASE

Ottawa Silica Company, (hereinafter referred to as the "Employer"), is engaged in the mining, processing and distribution of silica sand at various locations throughout the United States, including its Rockwood, Michigan plant, the situs of the events giving rise to this litigation. Approximately 53% of the sand from the Rockwood, Michigan plant is sold to glass manufacturers who, because of the unique nature of their production methods and

facilities, rely on a continuous flow of sand shipments from the quarry. (A. 26)[1]

Relationships between suppliers of silica sand and their glass customers are long-term relationships since manufacturers have a great reluctance to change suppliers because of a virtual certainty that the new suppliers' sand will have different chemical properties. (A. 26) There is also pressure against changing suppliers which results from the reliability of a supplier in shipping and delivering sand. Supply reliability is an important factor. In fact, Owens-Illinois Glass Company, which is the Employer's Rockwood, Michigan plant's most important customer, announced to Guy W. Wolcott, the Employer's Vice President of Sales, that if the Employer should fail to meet the supply requirements of the Owens-Illinois' plant during a work stoppage, that plant would turn to a competing supplier. (A. 27)

Thus, the ramifications of a failure of the silica sand company to ship to its glass customers are legion and lethal. If the customer were to switch to a competing supplier, it would mean a permanent loss of that customer's business, or of at least a portion thereof, as a result of the trade practices commonly followed between the sand suppliers and their customers and of the reluctance of manufacturers to switch from one sand supplier to another.

In May of 1970, the Employer commenced contract renewal negotiations with the collective bargaining representative of its employees at the Rockwood, Michigan facility—namely, Cylinder Gas, Chemical, Petroleum. Auto Service and Accessory Drivers, Maintenance,

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[1] References are to Appendix B of the Petition.

Mechanics, Helpers and Inside Employees Local No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local No. 283"). As was stipulated at the hearing, the parties negotiated in good faith throughout the month of May. Towards the end of May, the Employer was confronted on various occasions with an imminent threat of a strike. (A. 23-24) Caught between this imminent threat of a strike which could occur at any time, and the demands of its customers, the Employer locked out its employees on June 1, 1970. On that day, the Employer commenced to operate the Rockwood, Michigan plant with supervisory staff personnel from the Rockwood, Michigan plant, and similar employees from the employer's Ottawa, Illinois plant as well as with some sales personnel. (A. 26) Production capacity during the lockout was limited almost exclusively to maintaining needs of glass manufacturing customers which needs amounted to approximately 53% of the Rockwood plant's pre-lockout production. The lockout was terminated on June 5, 1970. (A. 24) On the following day, however, employees met and voted to go on strike. During the strike of about five month's duration, the Employer continued to operate the plant just as it had during the preceding week.

A charge was filed by Local 283 alleging that the Employer had unlawfully locked out its employees and had operated its Rockwood, Michigan plant with replacements. After investigation, a complaint was issued and a hearing before a Trial Examiner was held. The Trial Examiner found that the Employer's lockout of its employees on June 1 was not a violation of the Act. He went on to hold, however, that the Employer's continued limited operations with supervisors and other nonbargaining unit employees was a violation of Section 8(a)(1) and (3) of

the Act. (A. 27-28) On July 24, 1971, the Employer filed Exceptions to the Trial Examiner's decision. On June 13, 1972, the Board issued its Decision and Order, finding that the Employer's conduct did not violate Sections 8(a)(1) and 8(a)(3). The majority of the Board concluded that the Employer's conduct had a comparatively slight impact on protected employee rights. (A. 9) The Board's decision was affirmed by the U.S. Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE WRIT

I. The Decision Reached Below Has Not Created a Conflict Between the Courts of Appeals.

The Petitioner contends that the decisions reached below has, in light of the decision of the U.S. Court of Appeals for the Seventh Circuit in *Inland Trucking Co.* v. *N. L. R. B,.* 440 F. 2d 562 (7th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971), created a conflict among the Courts of Appeals. In advancing this contention, the Petitioner construes the Inland Trucking decision as adopting the principle that an employer's use of temporary replacements during the course of a lockout of regular unit employees will in all cases amount to a *per se* violation of the Act.

The *Inland Trucking* decision can properly be read as avoiding the strict application of a *per se* theory of illegality. In concluding that the employer had violated the Act in engaging temporary replacements during a bargaining lockout, the Court in *Inland Trucking* apparently limited its holding to the "circumstances at bar", 440 F. 2d at 565. Such limitation of a decision to the circumstances in the case is inconsistent with the development of a *per se* theory — i.e., the conduct in question is illegal in all cases.

Furthermore, in *Inland Trucking,* the Court specifically inquired into the existence of any legitimate and substantial business justification for the employer's conduct — and found none. An inquiry into considerations of legitimate and substantial business justification is relevant only where the conduct in question is not *per se* illegal. As this Court stated in dicta in *N. L. R. B.* v. *Brown,* 380 U. S. 278 (1965), conduct which amounts to a *per se* violation, i.e., conduct "demonstrably destructive of employee rights", violates the Act even though evidence of legitimate and substantial business justification exists, 380 U.S. at 382. In making this inquiry and in finding no legitimate and substantial business justification for the employer's conduct in *Inland Trucking,* the Court, then, avoided the strict application of a *per se* rule. It would appear that it rested its decision, in part at least, on other than a *per se* approach. To this extent, then, no conflict among the Courts of Appeals has emerged.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

JAN 21 1974

No. 73-807

In the Supreme Court of the United States

OCTOBER TERM, 1973

CYLINDER GAS, CHEMICAL, ETC., EMPLOYEES LOCAL NO. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

OTTAWA SILICA COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 482 F. 2d 945. The decision and order of the National Labor Relations Board (Pet. App. A3-A34) are reported at 197 NLRB No. 53.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1973 (Pet. App. A1). The petition for a writ of certiorari was filed on November 20, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer did not violate Section 8(a)(1) and (3) of the National Labor Relations Act by locking out his employees and continuing operations with temporary replacements obtained from outside the bargaining unit, in order to further his legitimate bargaining position.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page A35 of the petition.

STATEMENT

A. The Board's Findings of Fact

Ottawa Silica Company operates a plant at Rockwood, Michigan, where it mines, processes, and distributes silica sand, primarily to customers who utilize it in the manufacture of glass (Pet. App. A26; J.A. 75-77).[1] The Company's glass customers operate their furnaces continuously seven days a week and, because storage capacity is limited, the customers require a regular, uninterrupted supply of silica sand (Pet. App. A26; J.A. 110, 121-122, 123). Indeed, the customers maintain "daily communication" with the Company regarding the progress of shipments en route (Pet. App. A26; J.A. 112-113). If a glass furnace must be taken out of production

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[1] "J.A." refers to the joint appendix to the briefs in the court of appeals.

because of a shortage of silica sand, the customer may lose production with a retail value of $35,000 per day (Pet. App. A26-A27; J.A. 125).

Since May 19, 1967, petitioner Union has been the certified bargaining representative of the Company's production and maintenance employees at the Rockwood plant (Pet. App. A23).[2] Shortly after certification, the parties entered into a collective bargaining contract which expired on May 31, 1970 (Pet. App. A23). Prior to the expiration date, Union representative Vitale notified the Company that the Union desired to open negotiations on a new contract (Pet. App. A23).

From May 15 to May 31, 1970, the parties met on at least four occasions in an effort to reach agreement on a new contract (Pet. App. A23). At the May 25 meeting, Union President Schultz stated that "the company was going to pay, and pay through the nose" and that "if there was a strike the union would strike the company everywhere it operated * * *" (Pet. App. A23; J.A. 89). At the May 29 meeting, Vitale deprecated the Company's three new economic proposals, stating: "If that's all you've got, you deserve a strike." Vitale also stated that the Union's negotiating committee "was empowered to call a strike" (Pet. App. A23; J.A. 92). The Union rejected the Company's request to extend the current agreement for a week in order to permit the Company to "operate successfully and in good faith with its customers * * *" (Pet. App. A23; J.A. 93). The Union insisted that any extension be on a day-to-day basis (Pet. App. A23; J.A. 68). At the May 31 meeting,

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[2] From 1940 to 1967 these employees had been represented by another labor organization (Pet. App. A23).

the Union representatives told the Company that they would urge the employees to reject the Company's final contract proposals (Pet. App. A24; J.A. 94, 83). At the conclusion of this bargaining session, the Company announced that the 72 bargaining unit employees would be locked out effective immediately and that they would be replaced by supervisors (Pet. App. A24; J.A. 57).

Between June 1 and June 5, the Company maintained enough production to supply silica sand to its glass customers by utilizing 23 non-unit employees, including supervisory and sales personnel, and supervisors transferred from its Ottawa, Illinois plant (Pet. App. A24, A27; J.A. 58, 80). On June 5, the Company informed the Union by telegram that the unit employees could return to work on June 7 "under the same terms and conditions of employment as existed on May 31, 1970" (Pet. App. A24; J.A. 53, 100). On June 6, the Company sent a similar telegram to each of the unit employees (Pet. App. A24; J.A. 54). On June 7, the unit employees voted to reject the Company's contract proposals and to strike (Pet. App. A24-A25; J.A. 59-60). On June 8, the Union established a picket line at the Rockwood plant. The strike continued until October 25, 1970, when the parties reached agreement on a contract and all strikers were recalled to work (Pet. App. A25; J.A. 81, 60).

B. The Decisions Below

The Board (with two Members dissenting) held that the Company's lockout and use of non-unit, temporary replacements did not violate Section 8(a)(1) and (3) of the Act, and accordingly dismissed that portion of the

complaint (Pet. App. A3-A19).[3] Two Members of the Board majority considered the Company's conduct permissible because it was neither motivated by "antiunion considerations" nor "intended to discourage the exercise of protected employee rights," and the harm resulting to employee rights was "comparatively slight" since "the replacements were expressly used for the duration of the labor dispute only" (Pet. App. A8-A9). Chairman Miller agreed that the conduct was permissible because, in the circumstances here, the Company "utilized only its own nonunit personnel in carrying on its operations during the lockout," there was "reason to believe that a strike was imminent," and there was "some evidence * * * of a *bona fide* business justification for [the Company's] actions" (Pet. App. A11).

The court of appeals sustained the Board's dismissal of the complaint. It found "substantial evidence on the whole record in the unique circumstances of this case to support the findings of fact and conclusions of law of the Board majority" (Pet. App. A1-A2).

ARGUMENT

The holding of the court below that an employer, under the circumstances here, may continue operations with temporary replacements during an otherwise lawful lockout is correct. No issue warranting review by this Court is presented.

1. In *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, this Court held that "an

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[3] The Board also dismissed another portion of the complaint and affirmed the Examiner's finding that the Company violated Section 8(a)(1), (3) and (5) of the Act by its unilateral refusal to award holiday and vacation pay to the locked-out employees (Pet. App. A3-A4). These rulings are not contested here.

employer violates neither §8(a)(1) nor §8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure in support of his legitimate bargaining position" (*id.* at 318). The Court concluded that a lockout in these circumstances was neither so destructive of employee rights nor so devoid of a significant economic justification as to constitute a violation of these sections, absent a specific showing of anti-union motivation.

While the Court intimated no view "as to the consequences which would follow had the employer replaced his employees with * * * temporary help" (*id.* at 308, n. 8), in *National Labor Relations Board* v. *Brown,* 380 U.S. 278, decided the same day, it ruled that a lockout of employees by the non-struck employers of a multi-employer bargaining association, followed by the use of temporary replacements to maintain operations, was not proscribed by Section 8(a)(1) and (3) of the Act. The Court acknowledged that "the use of temporary nonunion personnel in preference to the locked-out union members was discriminatory," but concluded on balance that "any resulting tendency to discourage union membership was comparatively remote" and that the use of temporary replacements constituted a "measure reasonably adapted to the effectuation of a legitimate business end" (*id.* at 288).

The principle reflected in *American Ship Building* and *Brown* is that the propriety of an employer's use of economic weapons to further a legitimate bargaining position is to be determined by balancing, in each case, the motivation of the employer and the impact of those weapons on employee rights against the substantiality of the business justification shown by the employer.

See *National Labor Relations Board* v. *Great Dane Trailers,* 388 U.S. 26, 33-34; *Lane* v. *National Labor Relations Board,* 418 F. 2d 1208, 1211 (C.A. D.C.).

2. The Board's decision here constituted a proper application of this principle to the facts of this case. The Board found that the Company's lockout and use of temporary replacements were not motivated by union animus or by a purpose to restrain its employees in the exercise of Section 7 rights (Pet. App. A9, A11). It further found that the Company did not hire new employees to perform the work of the locked out employees, but merely used its own personnel who were not in the locked out unit; that the non-unit replacements were used only for the duration of the labor dispute; that the Company offered reinstatement to all regular unit employees when the lockout ended on June 7; and that all were immediately returned to work when the strike ended in October 1970.

In these circumstances, the Company's action had no significant impact on the unit employees' right to bargain collectively through their union representative. Indeed, the company's conduct actually resulted in the employees reaffirming their support for the Union, for the entire unit backed the Union's bargaining position throughout a four-month strike. Finally, the Company's action was supported by legitimate business considerations. Union negotiators expressly stated that a strike was likely as soon as the contract expired, and refused to grant the Company a one-week extension of the contract to enable it to service its glass customers. At least two of the Company's major glass customers gave notice that any interruption of deliveries would result in a search for a new supplier (Pet. App. A11; J.A. 114, 115, 111, 118, 136, 127, 137, 139-140).

The Board's holding is in accord with that of the Eighth Circuit in *Bookbinders Local No. 60* v. *National Labor Relations Board (Inter-Collegiate Press),* Nos. 72-1573 and 72-1749, decided October 25, 1973, 84 LRRM 2562, which involved a similar fact situation. And, the court below correctly held that the Board's findings and conclusions were supported by substantial evidence.

3. *Inland Truck Co.* v. *National Labor Relations Board,* 440 F. 2d 562 (C.A. 7), certiorari denied, 404 U.S. 858, relied upon by the Union, is distinguishable. There, the court sustained the Board's finding that the use of temporary replacements during an otherwise lawful lockout was a violation of Section 8(a)(1) and (3) of the Act. However, there, unlike here, the employer hired some new employees (179 NLRB 350, 352), and hence its action was more destructive of the bargaining rights of the locked-out employees.[4] Moreover, unlike here, there was no evidence of a bona fide business justification for the employer's action (*id.* at 359), and the union advised that it had no intention of striking and offered to give prior notice if it decided to do so (*id.* at 352).[5]

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[4] As the court emphasized in *Inland* (440 F. 2d at 564): "Employees [were] forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earnings opportunities over which the locked out employees were endeavoring to bargain."

[5] Although the court, in *Inland,* stated that "a lockout * * * accompanied by continued operation with replacement labor, is per se * * * an unfair labor practice under §158(a)(1)," that statement was qualified by the phrase "in the circumstances at bar" (440 F. 2d at 565).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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